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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

REARDEN LLC, et al.,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, et al.,

Defendants.

Case No. 17-cv-04006-JST

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTIONS TO DISMISS**

Re: ECF No. 69

REARDEN LLC, et al.,

Plaintiffs,

v.

CRYSTAL DYNAMICS, INC., et al.,

Defendants.

Case No. 17-cv-04187-JST

Re: ECF No. 65, 79

REARDEN LLC, et al.,

Plaintiffs,

v.

TWENTIETH CENTURY FOX FILM  
CORPORATION, et al.,

Defendants.

Case No. 17-cv-04191-JST

Re: ECF No. 46

REARDEN LLC, et al.,

Plaintiffs,

v.

PARAMOUNT PICTURES  
CORPORATION, et al.,

Defendants.

Case No. 17-cv-04192-JST

Re: ECF No. 45

1 Now before the Court are the consolidated motions to dismiss by three defendants in these  
2 four consolidated cases and a motion for joinder from the fourth defendant. The Court will grant  
3 the motions to dismiss in part and deny them in part.

4 **I. BACKGROUND**

5 This action centers on the MOVA Contour Reality Capture Program (“MOVA Contour” or  
6 “MOVA”), which – as the name suggests – is a program for capturing the motion of the human  
7 face to create images used in motion pictures. The ownership of this program and related  
8 hardware (collectively, the “Mova assets”) was contested in an earlier action.<sup>1</sup> *See Shenzhenshi, et al. v. Rearden, et al.*, No. 15-CV-00797 JST, ECF No. 1 (N.D. Cal. Feb. 20, 2015). On August 11, 2017, the Court found that Rearden owns the MOVA assets. *See Shenzhenshi, et al. v. Rearden, et al.*, No. 15-CV-00797 JST, ECF No. 427 at 18 (N.D. Cal. Aug. 11, 2017).

12 Plaintiffs Rearden LLC and Rearden Mova LLC (collectively, “Rearden”) now bring these  
13 actions against Defendants for copyright, patent, and trademark infringement. No. 17-cv-04006  
14 JST ECF No. 63 (“Disney FAC”); No. 17-cv-04187 JST ECF No. 49 (“Crystal FAC”); No. 17-cv-  
15 04191 JST ECF No. 41 (“Fox FAC”); No. 17-cv-04192 JST ECF No. 40 (“Paramount FAC”).  
16 Rearden alleges that the Defendants’ special effects vendor, Digital Domain 3.0 (“DD3”), directly  
17 infringed patents and the copyright in the MOVA Contour program. *See id.* Rearden alleges that  
18 Defendants contracted with DD3 “to provide facial performance capture services and output works  
19 made with the patented Contour systems and methods and the copyrighted Contour program.” Disney  
20 FAC ¶ 97. *See also* Crystal FAC ¶ 94; Fox FAC ¶ 103, Paramount FAC ¶ 91. The Court previously  
21 issued an order granting in part and denying in part Defendants’ motions to dismiss the complaint.  
22 Rearden filed amended complaints on March 6, 2018. The studio Defendants – Disney, Fox, and  
23 Paramount (hereinafter “Defendants”) – move for partial dismissal of the first amended complaint.  
24 Defendant Crystal Dynamics joins the motion.

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27 <sup>1</sup> The Statement of Decision in that action includes a summary of the facts underlying the  
28 ownership dispute. *See Shenzhenshi, et al. v. Rearden, et al.*, No. 15-CV-00797 JST, ECF No. 427 (N.D. Cal. Aug. 11, 2017).

1       **II.    LEGAL STANDARD**

2           While a complaint need not contain detailed factual allegations, facts pleaded by a plaintiff  
3           must be “enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,  
4           550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, a complaint must  
5           contain sufficient factual matter that, when accepted as true, states a claim that is plausible on its  
6           face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the  
7           plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
8           defendant is liable for the misconduct alleged.” *Id.* While this standard is not a probability  
9           requirement, “[w]here a complaint pleads facts that are merely consistent with a defendant’s  
10           liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.*  
11           (internal quotation marks and citation omitted). In determining whether a plaintiff has met this  
12           plausibility standard, the Court must “accept all factual allegations in the complaint as true and  
13           construe the pleadings in the light most favorable” to the plaintiff. *Knivele v. ESPN*, 393 F.3d at  
14           1072. If the motion to dismiss is granted, the court should grant leave to amend “even if no  
15           request to amend the pleading was made, unless it determines that the pleading could not possibly  
16           be cured by the allegation of other facts.” *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)  
17           (internal quotation marks and citation omitted).

18       **III.    DISCUSSION**

19           Defendants argue that Rearden’s secondary copyright liability claims for vicarious and  
20           contributory copyright infringement should be dismissed. ECF No. 69 at 13.<sup>2</sup> They also argue  
21           that Rearden’s amended direct patent infringement claims should be dismissed. *Id.* at 24.

22       **A.      Vicarious Copyright Infringement**

23           “To succeed in imposing vicarious liability, a plaintiff must establish that the defendant  
24           exercises the requisite control over the direct infringer and that the defendant derives a direct  
25           financial benefit from the direct infringement.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d  
26           1146, 1173 (9th Cir. 2007). Defendants argue that the studios are not vicariously liable for DD3’s

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<sup>2</sup> Unless otherwise noted, all electronic case filing number citations are to documents filed in *Rearden LLC, et al., v. The Walt Disney Company, et al.*, Case No. 17-cv-04006.

1 use of unlicensed software because (1) Rearden does not allege that any studio had both the right  
2 and practical ability to supervise DD3's use of infringing software and (2) Rearden does not allege  
3 that any studio obtained a direct financial benefit. ECF No. 69 at 14-18.

4 **1. Requisite Control**

5 "A vicarious infringer 'exercises control over a direct infringer when he has both a legal  
6 right to stop or limit the directly infringing conduct, as well as the practical ability to do so.'"

7 *Williams v. Gaye*, 885 F.3d 1150, 1177 (9th Cir. 2018) (quoting *Amazon.com*, 508 F.3d at 1173).

8 First, Defendants argue that Rearden does not plausibly allege that the Studios had the  
9 right to stop or limit the infringing conduct because Rearden does not allege that any Studio has  
10 "the contractual right to control the selection or operation of the software DD3 used or otherwise  
11 had any involvement in the process of operating the equipment that DD3 used to supply its  
12 services." ECF No. 69 at 14. Defendants cite *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d  
13 1146, 1173-74 (9th Cir. 2007) for this proposition. ECF Nos. 69 at 14; 78 at 7.

14 In *Amazon.com*, plaintiff Perfect 10 appealed the denial of a preliminary injunction against  
15 defendants Amazon.com and Google. *Amazon.com*, 508 F.3d at 1157. The Ninth Circuit  
16 evaluated Perfect 10's arguments that Google was vicariously liable for third-party websites'  
17 reproduction, display, and distribution of unauthorized copies of Perfect 10's images on the  
18 internet. *Id.* at 1173. The Ninth Circuit held that Perfect 10 did not demonstrate a likelihood of  
19 success in establishing that Google had the right and ability to stop or limit the infringing activities  
20 of third party websites. *Id.* 1173. The court noted that Google had the contractual right to  
21 terminate Perfect10's "Adsense partnership" but that this did not "give Google the right to stop  
22 direct infringement by third party websites" because "[a]n infringing third-party website can  
23 continue to reproduce, display, and distribute its infringing copies of Perfect 10 images after its  
24 participation in the Adsense program has ended." *Id.* at 1173-74.

25 The Ninth Circuit contrasted Google's capabilities to those of the swap meet operators in  
26 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262-63 (9th Cir. 1996). In *Fonovisa*, the  
27 Ninth Circuit found that a swap meet operator's "broad contract with its vendors" was sufficient to  
28 satisfy the control requirement because it "had the right to terminate vendors for any reason

1       whatsoever and through that right had the ability to control the activities of vendors on the  
2       premises.” *Id.* at 263. Unlike *Fonovisa*, Google did not have “contracts with third-party websites  
3       that empower Google to stop or limit them from reproducing, displaying, and distributing  
4       infringing copies of Perfect 10’s images on the Internet.” *Amazon.com*, 508 F.3d at 1173.

5       The Ninth Circuit also noted that Google was not similarly situated to Napster in *A&M*  
6       *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001). “Because Napster had a  
7       closed system requiring user registration, and could terminate its users’ accounts and block their  
8       access to the Napster system, Napster had the right and ability to prevent its users from engaging  
9       in the infringing activity of uploading file names and downloading Napster users’ music files  
10       through the Napster system. By contrast, Google cannot stop any of the third-party websites from  
11       reproducing, displaying, and distributing unauthorized copies of Perfect 10’s images because that  
12       infringing conduct takes place on the third-party websites.” *Amazon.com*, 508 F.3d at 1174  
13       (internal quotation marks and citations omitted.)

14       Here, the Studios are more similarly situated to the swap meet operator and Napster.  
15       Rearden alleges that DD3 provided services pursuant to contracts that gave each studio “the  
16       unrestricted right to cancel any portion of the Services.” Disney FAC ¶¶ 137, 151, 168; Fox FAC  
17       ¶¶ 133, 146; Paramount FAC ¶¶ 115, 128. Thus, Rearden alleges that the Studios had the right to  
18       prevent DD3 from engaging in the infringing activity because they had the unrestricted right to  
19       cancel the use of the MOVA Contour program. Unlike in *Amazon.com*, where Google only had  
20       the right to terminate the Adsense partnership—which would not have stopped direct infringement  
21       by third parties—the studios could have ended the direct infringement by cancelling the use of the  
22       MOVA Contour program. *See Perfect 10*, 508 F.3d at 1174. *See also Routt v. Amazon.com, Inc.*,  
23       584 F. App’x 713, 714-15 (9th Cir. 2014) (“A defendant has control over a third party’s infringing  
24       conduct when the defendant can directly put an end to that conduct.”).

25       Next, Defendants argue that Rearden “fails to allege that any Studio had the practical  
26       ability to supervise the loading of MOVA Contour into RAM.” ECF No. 69 at 15. However,  
27       Rearden alleges that “[Defendants were] in a position to police DD3’s infringing acts. [They] had the  
28       authority and practical ability to observe and evaluate services provided by DD3 and—if [Defendants]

1       deemed those services inadequate, improper, or unlawful—require DD3 to remedy the services or  
2       cancel DD3’s provision of services to defendants but declined to exercise that right.” Disney FAC ¶¶  
3       137, 168; Fox FAC ¶¶ 133,146; Paramount FAC ¶¶ 115, 128. Thus, Rearden provides factual  
4       allegations that at least suggest that Defendants had control of DD3 through their ability to observe  
5       and evaluate DD3’s services.

6       Defendants contend that these allegations are not plausible because Rearden “does not  
7       allege that any Studio had any interaction with the technical aspect of the MOVA Contour system  
8       or the software itself” and that “all of the practical hands-on involvement” is alleged to have rested  
9       with DD3. ECF No. 69 at 15. At this stage, however, the Court must “accept all factual  
10       allegations in the complaint as true.” *Knievel*, 393 F.3d at 1072. It is not implausible that through  
11       their observation and evaluation of services, Defendants could have observed the infringing  
12       activity and directed DD3 to stop using the MOVA Contour program.<sup>3</sup> Therefore, Rearden  
13       sufficiently alleges “a legal right to stop or limit the directly infringing conduct, as well as the  
14       practical ability to do so.” *Williams*, 885 F.3d at 1177 (internal citation and quotation marks  
15       omitted).

## 16                   2.        **Direct Financial Benefit**

17       “Financial benefit exists where the availability of infringing material acts as a draw for  
18       customers.” *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004) (internal quotation marks  
19       and citations omitted). “[T]he size of the ‘draw’ relative to a defendant’s overall business is  
20       immaterial. Indeed, [t]he essential aspect of the ‘direct financial benefit’ inquiry is whether there  
21       is a causal relationship between the infringing activity and any financial benefit a defendant reaps,  
22       regardless of how substantial the benefit is in proportion to a defendant’s overall profits.” *Perfect  
23       10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir.), *cert. denied*, 138 S. Ct. 504, (2017)  
24       (internal quotation marks and citation omitted). “There is no requirement that the draw be  
25       substantial.” *Ellison*, 357 F.3d 1072, 1079 (9th Cir. 2004).

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<sup>3</sup> Vicarious liability “allows imposition of liability when the defendant profits directly from the  
28       infringement and has a right and ability to supervise the direct infringer, even if the defendant  
initially lacks knowledge of the infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931 n.9 (2005).

1 Rearden alleges that Defendants “had an obvious and direct financial interest in  
2 exploitation of Rearden’s copyright in the Contour program” because they believed that Contour  
3 performance motion capture would make movie characters more believable which would in turn  
4 “draw a wider audience to the films.” Disney FAC ¶ 138, 169; Fox FAC ¶ 134; Paramount FAC ¶  
5 116. Defendants argue that the relationship “between loading MOVA Contour into RAM and the  
6 ultimate appearance on screen of ‘believable and compelling’ CG characters that ‘draw a wider  
7 audience’ to theaters is highly attenuated.” ECF No. 69 at 17. They contend that “Rearden has  
8 not plausibly alleged that DD3’s use of unlicensed software constitutes a draw for moviegoers, as  
9 opposed to providing an added benefit to the finished movie.” ECF No. 69 at 18.

10 Defendants cite *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) to support their  
11 arguments. Notably, in *Ellison*, the Ninth Circuit considered the lower court’s summary judgment  
12 dismissal of a copyright infringement action against America Online, Inc. (AOL). *Id.* at 1074.  
13 The question before the court was “whether there [was] a triable issue of a material fact regarding  
14 whether AOL received a direct financial benefit from the copyright infringement.” *Id.* at 1079.  
15 Ultimately, the court concluded that plaintiff had not offered enough evidence for a reasonable  
16 juror to find a direct financial benefit. *Id.*

17        Here, the Court is not asked whether Rearden has sufficient evidence to create a triable  
18 issue of material fact. The Court is only asked whether Rearden plausibly alleged a direct  
19 financial benefit. It has. *See Rams v. Def Jam Recordings, Inc.*, 202 F. Supp. 3d 376, 385  
20 (S.D.N.Y. 2016) (finding that plaintiffs sufficiently alleged that a recording artist benefited  
21 financially from the use of a copyrighted portrait on various marketing and advertising materials,  
22 including the album cover of a hit single and its remixes, despite the attenuated connection  
23 between the image and the profits<sup>4</sup>); *c.f.*, *Thomson v. HMC Grp.*, No. CV1303273DMGVBKX,

<sup>4</sup> The court held that plaintiffs sufficiently alleged that the recording artist, Felton, benefitted financially from the infringing activity “[b]ecause the image of Rams with her index finger perpendicular to her closed lips is commonly understood to mean ‘Shh, don’t tell,’ [therefore] the image communicates the title of Felton’s song, ‘Don’t Tell ‘Em.’ As the literal ‘face’ of Felton’s single, Flemming’s portrait of Rams therefore plays a role in the song’s, and therefore, Felton’s marketability, reaping him direct financial benefits in the form of album sales.” *Rams*, 202 F. Supp. 3d at 385.

1 2014 WL 12589313, at \*4 (C.D. Cal. July 25, 2014) (finding that plaintiff had not sufficiently  
2 alleged that defendant had a financial interest in the infringing activity because he did “not allege  
3 that the use of his designs acts as a ‘draw’” for [defendant’s] patients).

4 Therefore, Rearden has sufficiently alleged vicarious copyright infringement. Defendants’  
5 motion to dismiss is denied.

6 **B. Contributory Copyright Liability**

7 “[A] defendant is a contributory infringer if it (1) has knowledge of a third party’s  
8 infringing activity, and (2) “induces, causes, or materially contributes to the infringing conduct.”  
9 *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007). Regarding the first  
10 element, generally speaking, “actual knowledge of specific acts of infringement” is required for  
11 contributory infringement liability.” *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068,  
12 1072 (9th Cir. 2013) (quoting *A&M Records, Inc. v. Napster Inc.*, 239 F.3d 1004, 1021 (9th Cir.  
13 2001)).

14 **1. Knowledge**

15 Rearden alleges that Disney “had previously contracted with Rearden and/or its controlled  
16 entities to provide authorized facial performance capture services and Contour program output  
17 works . . . and had performed intellectual property due diligence.” Disney FAC ¶ 116. It alleges  
18 that Disney performed intellectual property due diligence when it contracted with DD3, and based  
19 upon this due diligence it knew or should have known that DD3 did not have the right to offer or  
20 provide services and works made using the patented and copyrighted program. *Id.* Assuming the  
21 truth of these allegations, it is not an unreasonable inference that Defendants became aware of  
22 Rearden’s copyright and DD3’s infringing activity before contracting with DD3. As the Court  
23 previously stated, the allegations are unquestionably thin, but they are enough to survive a motion  
24 to dismiss.<sup>5</sup>

25 Rearden alleges that Fox and Paramount “had previously contracted with Rearden and its

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27 <sup>5</sup> The Court previously noted that it “has its doubts that Disney actually engaged in the kind of  
28 intellectual property due diligence with either Rearden or DD3 that plaintiff alleges, but  
nonetheless concludes that the allegation survives an *Iqbal/Twombly* challenge.” See ECF No. 60.

1 controlled [entities] to provide authorized [Contour] facial performance capture services and  
2 Contour program output works.” Fox ¶ 98, 107, 117; Paramount ¶ 92. Significantly, Rearden  
3 does not allege that Fox and Paramount previously performed due diligence when they directly  
4 contracted with Rearden, but instead simply alleges that “[o]n information and belief, Fox [and  
5 Paramount] likewise conducted due diligence to determine whether DD3 was authorized to offer  
6 the Contour system, methods, and Contour program.” *Id.* The plaintiff may “plead facts ‘alleged  
7 upon information and belief where the facts are peculiarly within the possession and control of the  
8 defendant or where the belief is based on factual information that makes the inference of  
9 culpability plausible.’” *Kelsey K. v. NFL Enterprises, LLC*, 254 F. Supp. 3d 1140, 1143 (N.D.  
10 Cal. 2017) (quoting *Soo Park v. Thompson*, 851 F.3d 910, 928–29 (9th Cir. 2017)). Here, unlike  
11 with Disney, Rearden does not have any additional factual information about the Paramount and  
12 Fox allegations to make the inference of culpability plausible.

13 However, Rearden does argue that the due diligence allegations are bolstered by  
14 allegations that the studios, through employees and agents, “reviewed color and grayscale Contour  
15 output works that were consistently and extensively marked with Rearden’s [] copyright notice.”  
16 Fox ¶ 117; Paramount ¶ 92. Both parties debate the likelihood that a studio representative would  
17 actually have seen the copyright notice and whether it would adequately alert that employee that  
18 DD3 was using the software without a license. *See* ECF No. 69 at 21-22; 74 at 24-26; 78 at 13-14.  
19 At this early stage, however, the Court must “construe the pleadings in the light most favorable” to  
20 the plaintiff. *Knivele*, 393 F.3d at 1072. Even if it is unlikely that a studio representative saw the  
21 copyright notice, it is not implausible. And it is not implausible that a copyright notice would  
22 have given the studio representative reason to know of the direct infringement. *See Ellison*, 357 at  
23 F.3d at 1076 (“We have interpreted the knowledge requirement for contributory copyright  
24 infringement to include both those with actual knowledge and those who have reason to know of  
25 direct infringement.”).

26 **2. Material Contribution**

27 Rearden also alleges that Defendants, either directly or through an agent, contracted with  
28 DD3 to provide facial performance capture services and output works using the patented and

1 copyrighted Contour program. Disney FAC ¶ 113 Fox FAC ¶137; Paramount FAC ¶ 119. They  
2 allege that Defendants “initiated and scheduled each facial performance capture session with DD3  
3 using the Contour program” and that “[e]ach of the requests for facial performance captures caused  
4 DD3 to use the Contour program, which created an infringing copy of the program for non-transitory  
5 duration in the RAM of Contour system computers.” *See, e.g.*, Disney FAC ¶¶ 131, 144, 174, 175;  
6 Fox FAC ¶¶ 138, 139; Paramount FAC ¶¶ 109, 120, 121.

7 Defendants argue that “hiring a vendor does not materially contribute to the vendor’s  
8 infringing use of unlicensed software.” ECF No. 69 at 18. But, Rearden does not simply allege that  
9 Defendants hired a vendor. It alleges Defendants directed that vendor to use the copyrighted MOVA  
10 program by contracting with DD3 to use the MOVA Contour program. *See Med-Sys., Inc. v.*  
11 *Masterson Mktg., Inc.*, No. 11CV695 JLS BLM, 2011 WL 5873399, at \*7 (S.D. Cal. Nov. 23, 2011)  
12 (finding that counterclaimant had not adequately alleged material contribution because the  
13 counterclaimant merely alleged that counter defendant “was involved in all of the contracting with  
14 [counterclaimant], and not that [counter defendant] took any affirmative steps to foster [] distribution  
15 and display of the copyrighted materials...[The counterclaimant] must allege that counter defendant  
16 had some involvement in directing the infringing use of the photos in order to state a claim for  
17 contributory infringement....”)

18 Defendants argue that “DD3 loaded the Contour software program into computers’ RAM  
19 without any knowledge, assistance, or encouragement from any Studio” and that “the Studios were not  
20 directly (or indirectly) involved in DD3’s decision to use the MOVA Contour software program,  
21 DD3’s alleged decision to use the software without a license, or any of the technical elements of  
22 DD3’s interactions with the software.” ECF Nos. 69 at 19, 78 at 10. This very well may be true and  
23 Defendants are free to argue at summary judgment or trial that Rearden has not sufficiently  
24 established that Defendants directed DD3 to use the copyrighted MOVA Contour program.  
25 However, at this motion to dismiss stage, these allegations plausibly allege that Defendants  
26 induced, caused, or materially contributed to the infringing conduct. *See Visa*, 494 F.3d at 795.

27 **C. Direct Patent Infringement**

28 Under the patent law, one is liable for direct infringement if she “without authority makes,

1 uses, offers to sell, or sells any patented invention, within the United States or imports into the  
2 United States any patented invention during the term of the patent.” 35 U.S.C. § 271(a). In  
3 *Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc.*, 631 F.3d 1279, 1284 (Fed. Cir. 2011), the  
4 Federal Circuit held that “to ‘use’ a system for purposes of infringement, a party must put the  
5 invention into service, i.e., control the system as a whole and obtain benefit from it.” This  
6 requires “a party . . . to use each and every . . . element of a claimed [system].” *Id.* However, a  
7 party is not required to “exercise physical or direct control over each individual element of the  
8 system.” *Id.*

9 The Federal Circuit has since explained that “[i]n an analysis of a system claim under  
10 *Centillion*, proof of an infringing ‘use’ of the claimed system under § 271(a) requires the patentee  
11 to demonstrate that the direct infringer obtained ‘benefit’ from each and every element of the  
12 claimed system.” *Intellectual Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329  
13 (Fed. Cir. 2017). And, it recently explicitly clarified that *Centillion* pertained to a situation where  
14 each party possessed at least some of the elements of the system. *Grecia v. McDonald’s Corp.*,  
15 No. 2017-1672, 2018 WL 1172580, at \*3 (Fed. Cir. Mar. 6, 2018).<sup>6</sup>

16 The Court dismissed Rearden’s first direct infringement claim against Disney because  
17 Rearden did not plausibly allege that Disney used the patented MOVA Contour system under  
18 *Centillion*. ECF No. 60. Rearden argues that *Centillion* applies to its amended complaint because  
19 the “FACs allege that the components of the claimed system were in the joint possession of  
20 Defendants and DD3.” ECF No. 74 at 31. Rearden alleges that the contract between DD3 and  
21 Disney MPG was a “Facility Use and Services Agreement” where DD3 authorized Disney to use  
22 designated portions of DD3’s facilities in connection with the shoot, subject to supervision by any  
23 DD3 employee which DD3 may deem appropriate. Disney FAC ¶ 195, 232, 267, 305, 341. DD3  
24 also alleges that the contract grants Disney the right to cancel any portion of the services subject  
25 only to the duty to pay for costs and services performed before the allegation and that Disney  
26 transmitted a request to DD3 to initiate and schedule each performance capture session. *Id.*

27  
28 <sup>6</sup> Pursuant to Ninth Circuit Rule 36-3, *Grecia* is not precedential. Nevertheless, the Court uses it  
as persuasive authority.

¶¶ 196, 233, 268, 306, 342. Finally, Rearden alleges that Disney provided facial performers and directors to start and terminate each session, start and stop each take, and to choose “Selects.”<sup>7</sup> *Id.* ¶¶ 132-33; 145-46; 163-64; 176-77; 199-200; 236-27; 309-10 345-46.

These allegations show that Disney contracted with DD3. However, they fail to show that Disney was in possession of any of the elements of the MOVA system.<sup>w</sup> Therefore, *Centillion* does not apply.

Without *Centillion*, Rearden does not provide any authority that it adequately alleges direct infringement. Rearden does not argue that it can allege use without possessing any element of the claimed system nor does it provide any authority supporting this contention. Rearden having twice failed to allege a sufficient direct infringement claim, Defendant's motion to dismiss that claim is granted with prejudice. *See Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (citation omitted) ("A district court's discretion to deny leave to amend is 'particularly broad' where the plaintiff has previously amended.").

## **D. Motions for Joinder**

Defendants in *Rearden LLC, et al., v. Crystal Dynamics, Inc., et al.*, Case No. 17-cv-4187-JST, filed a motion for joinder in the studio Defendants' motions to dismiss and reply briefs, ECF Nos. 65, 79. The Court grants the motion.

## CONCLUSION

The motions to dismiss the vicarious and contributory copyright infringement claims are denied. The motions to dismiss the direct patent infringement claims are granted with prejudice.

## IT IS SO ORDERED.

Dated: June 18, 2018

  
JON S. TIGAR  
United States District Judge

<sup>7</sup> The FAC defines “Selects” as “the Contour capture takes which were deemed ‘good takes’ by the director.” FAC ¶ 133.